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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 2

[FAC 2020-01; FAR Case 2018-008; Docket No. FAR-2018-0008;

Sequence No. 1]

RIN 9000-AN68

Federal Acquisition Regulation: Definition of "Commercial Item"

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA and NASA are issuing a final rule to amend the Federal Acquisition Regulation (FAR) to implement a section of the National Defense Authorization Act for Fiscal Year 2018 to revise the definition of a "commercial item."

DATES: Effective: **[Insert date 30 days after date of publication in the FEDERAL REGISTER].**

FOR FURTHER INFORMATION CONTACT: Ms. Zenaida Delgado, Procurement Analyst, at 202-969-7207 or zenaida.delgado@gsa.gov for clarification of content. For

information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755. Please cite FAC 2020-01, FAR Case 2018-008.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule in the Federal Register at 84 FR 20607 on May 10, 2019, to implement the statutory changes made to the definition of "commercial item" by section 847 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Pub. L. 115-91, enacted December 12, 2017). The rule would broaden the definition to allow certain additional items developed exclusively at private expense to qualify for the benefits associated with being treated as a commercial item. Section 847 expands the universe of nondevelopmental items (NDIs) that qualify as commercial items to include items sold, in substantial quantities on a competitive basis, to multiple foreign governments. Three respondents submitted comments on the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the

final rule. A discussion of the comments is provided as follows:

A. Summary of changes

This final rule amends the definition of commercial item in FAR part 2 to reflect the statutory change made by section 847. Specifically, the rule adds the phrase "or to multiple foreign governments" at the end of paragraph (8). There are no changes as a result of comments on the proposed rule.

B. Analysis of public comments

1. Supports the proposed rule.

Comment: One respondent stated that the proposed rule accurately and effectively implements section 847.

Response: Noted.

2. Does not support the proposed rule.

Comment: One respondent stated that the rule is unnecessary, clouds the definition of what a commercial item is, and sets the stage for contracting officers to lose the ability to require contractors to provide certified cost or pricing data.

Response: The rule is necessary to implement section 847 of the NDAA for FY 2018. The Councils do not agree that the implementing rule will complicate the definition of commercial item and note that the transactions, which will

now become subject to FAR part 12, will be more simplified and less costly as a result of the reduced number of government-unique requirements that will be applied.

3. Potential burden reductions associated with future regulatory actions that facilitate broader acquisition of commercial items.

Comment: One respondent, in response to a request for feedback in the Federal Register notice for the proposed rule, provided recommendations with regard to potential burden reductions associated with future regulatory actions that facilitate broader acquisition of commercial items, and cited policies that restrict the commercial item acquisition process and pose a serious threat to the Government's access to the commercial industrial base.

Response: These comments are outside the scope of this case, but will be considered in relation to future regulatory actions.

4. Other expansion of the definition of "commercial item."

Comment: One respondent recommended expanding the definition of "commercial item" to include "spare assemblies or piece parts which are a component of the higher level commercial item."

Response: This recommendation is outside the scope of this case, and the Councils do not believe there is a need for additional regulatory clarification of this nature.

III. Expected Impact on the Public

Implementation of this rule allows for an increased number of transactions to benefit from the less burdensome requirements associated with rules governing commercial items. Under this rule, for the first time, NDIs that are developed exclusively at private expense and sold in substantial quantities to multiple foreign governments may be treated as commercial items.

Because commercial items, which include commercially available off-the-shelf items, are sold to the Government in the same way as NDIs, the Government can take advantage of technological advances without the need for costly, time-consuming, Government-sponsored research and development programs. All of this is made possible due to previous testing and general acceptance of the product in the commercial marketplace or by a state, local, or foreign government.

To promote the Government's acquisition of commercial items, the law and FAR part 12 create a preference for buying commercial items and provide relief from certain recordkeeping, reporting, and compliance requirements.

According to an analysis published by the Section 809 Panel at page 23 of its "May 2017 Interim Report," available at https://section809panel.org/wp-content/uploads/2017/05/Sec809Panel_Interim-Report_May2017_FINAL-for-web.pdf, commercial item acquisitions are subject to up to 138 contract clauses, while acquisitions for NDIs that do not meet the commercial item definition as well as acquisitions for noncommercial items could be subject to nearly 500 clauses, depending on the principal type and purpose of the contract. For example, a commercial firm selling an NDI today to multiple foreign governments in substantial quantities could face compliance costs with the Truth in Negotiations Act (TINA), which requires implementation of Government-specific business systems for any modifications to competitively awarded items. TINA has long been recognized under analyses performed in accordance with the Paperwork Reduction Act as one of the most costly statutes and regulations in Federal procurement. In addition, policies governing commercial item acquisitions favor reliance on commercial sector business practices and use of standard commercial terms and conditions to the maximum extent practicable. Each of these dimensions of the commercial item framework contributes to more simplified and less costly transactions.

DoD, GSA, and NASA are unable to monetize the cost savings, because procurement data is not captured in a manner that enables a determination to be made regarding how many NDIs developed exclusively at private expense have been sold or are expected to be sold to multiple foreign governments in substantial quantities, that are not also sold in substantial quantities to multiple State and local governments. For these reasons and though the public comment period did not provide data to monetize savings, this rule is considered deregulatory.

IV. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-shelf (COTS) Items

This rule amends the FAR to change the definition of "commercial item". The revision does not add any new solicitation provisions or clauses, or impact any existing provisions or clauses.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O.

13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule is not a significant regulatory action and was not subject to the review of the Office of Information and Regulatory Affairs under section 6(b) of E.O. 12866. This rule is not a major rule under 5 U.S.C. 804.

VI. Executive Order 13771

This final rule is an E.O. 13771 deregulatory action per the discussion found in Section III, Expected Impact on the Public, of this preamble.

VII. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

This rule is required to implement section 847 of the NDAA for FY 2018. The objective is to treat nondevelopmental items, developed at private expense, that have been sold to multiple foreign governments, as commercial items.

There were no significant issues raised by the public in response to the initial regulatory flexibility analysis.

This rule will impact any entities offering to the Federal Government a nondevelopmental item, developed at private expense, that has been sold to multiple foreign governments, but did not otherwise qualify as a commercial item. There are over 327,458 small business registrants in the System for Award Management database, but it is unknown how many of those registrants may offer to the Government a nondevelopmental item, developed at private expense, that has been sold to multiple foreign governments, but does not

otherwise qualify as a commercial item. It is not expected that this rule will have a significant economic impact on a substantial number of small entities, because the number of affected entities is not expected to be substantial, and any impact will be beneficial, due to the treatment of additional nondevelopmental items as commercial items.

The rule does not include additional reporting or recordkeeping requirements.

There are no available alternatives to the rule to accomplish the desired objective of the statute. Small businesses would benefit from the streamlined commercial acquisition procedures.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat Division has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

VIII. Paperwork Reduction Act

This rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 2

Government procurement.

William F. Clark,
Director, Office of Government-wide Acquisition Policy,
Office of Acquisition Policy, Office of Government-wide
Policy.

Therefore, GSA, DoD, and NASA amend 48 CFR part 2 as
follows:

PART 2—DEFINITIONS OF WORDS AND TERMS

1. The authority citation for 48 CFR part 2 continues
to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137;
and 51 U.S.C. 20113.

2. Amend section 2.101, in paragraph (b) (2), in the
definition of "commercial item", by revising paragraph (8),
to read as follows:

2.101 Definitions.

* * * * *

Commercial item * * *

(8) A nondevelopmental item, if the procuring agency
determines the item was developed exclusively at private
expense and sold in substantial quantities, on a

competitive basis, to multiple State and local governments
or to multiple foreign governments.

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